MOTION FILED
JUN 1 6 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-839

ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,
Appellant,

v.

ROBERT ROE, *et al.*,
Appellees,

—and—

GEORGE PATIENT, *et al.*,
Intervenor-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE NATIONAL ASSOCIATION OF MENTAL HEALTH, THE AMERICAN PSYCHIATRIC ASSOCIATION, AND THE AMERICAN PSYCHOANALYTIC ASSOCIATION

ROBERT PLOTKIN
PAUL R. FRIEDMAN
MENTAL HEALTH LAW PROJECT
1220 Nineteenth Street, N.W.
Washington, D.C. 20036
202—467-5730

Counsel for *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Counsel for the National Association for Mental Health, American Psychiatric Association, and the American Psychoanalytic Association, hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the appellees has been obtained. The attorney for the appellants did not consent to the filing of this brief.

This case involves a constitutional challenge to a state statute which requires reporting and computerizing the names of all persons in the state legitimately using properly prescribed medication, the effect of which is to deter and inhibit persons from seeking needed medical and psychiatric services. The *amici* organizations, which are described more fully in the attached brief, represent more than a million medical practitioners and clients of mental health services who have an important interest in promoting the care and treatment of those in need of mental health assistance.

Effective provision of mental health services demands an atmosphere of trust and confidentiality in the psychotherapeutic relationship. This is important because inherent in effective psychotherapy is a frank discussion of the meaning of intimate and embarrassing acts, feelings, and fantasies which will not be revealed without assurances of confidentiality. Moreover, the mere disclosure that a person is engaged in psychotherapy, or is receiving medication from a psychiatrist, may result in social stigmatization, the loss of employment, and the disruption of personal lives. Their concern for confidentiality leads *amici* to conclude that unnecessary governmental record-keeping systems such as the one involved in the instant case will act as an improper deterrent to persons in need of mental health services. Accordingly, *amici* move this Court for leave to file the attached brief.

Respectfully submitted,

ROBERT PLOTKIN
PAUL R. FRIEDMAN
MENTAL HEALTH LAW PROJECT
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for *Amici Curiae*

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Association for Mental Health (hereinafter NAMH) is a not-for-profit corporation founded in 1909 under the name of the National Committee for Mental Hygiene; it assumed its present name upon a merger with similar groups in 1950. NAMH is a volunteer organization the primary function of which is to promote citizen interest and activity on behalf of the

mentally ill and for the cause of mental health. The NAMH is comprised of 950 chapters throughout the nation and it has a total membership of approximately one million. The purposes of the Association are to improve attitudes toward mental illness and the mentally ill; to improve services for the mentally ill; and to work for the prevention of mental illness and to promote mental health.

The American Psychiatric Association, founded in 1844, is the oldest national medical society in the United States. Its 22,000 members comprise about 80 percent of all physicians who practice psychiatry and specialize in the treatment of emotional and psychological problems. It publishes the leading scientific journal in the field, *The American Journal of Psychiatry*, as well as the *Journal of Hospital and Community Psychiatry*, and a twice-monthly newspaper *Psychiatric News*. Recently, the Association has taken the lead in the formation of the new National Commission on Confidentiality of Health Records, Inc., and has created its own Task Force on Confidentiality as it Relates to Third Parties.

The American Psychoanalytic Association was founded in 1911. It is the largest national organization of medically trained psychoanalysts in the United States and is affiliated with the International Psychoanalytical Association. The Association has 2,270 members, and publishes a quarterly scientific journal, *The Journal of the American Psychoanalytic Association*. The purposes of the American Psychoanalytic Association include the study and advancement of psychoanalytic theory, the advocacy and maintenance of standards for the training and practice of psychoanalysts, and encouragement of research relevant to man's scientific knowledge and to human welfare. The Association has an "Ad Hoc Joint Committee on Confidentiality," and is, with the American Psychiatric Association, a participating and founding organization of the new National Commission on the Confidentiality of Health Records, Inc.

Collectively, the above organizations have a strong commitment to assuring citizen access to mental health services, and to assuring the consumers of such services that they can choose the treatment modality that will be most appropriate to their individual needs, free from unnecessary or overbroad governmental intrusions upon the necessary promise of confidentiality.

The instant case involves a state regulatory scheme, the effect of which has been to deter people from seeking medical services, including mental health services and demonstrates the negative impact and deterrent effects that the unnecessary collection, centralization, and computerization of medical information may have upon the voluntary clients of the mental health system. Amici seek to assist the Court in resolving the apparent conflict between the state's legitimate interest in regulating narcotics and the patients' legitimate need for privacy.

STATEMENT OF THE CASE

This class action brought on behalf of anonymous patients and their physicians successfully challenged the constitutionality of certain portions of the New York Controlled Substances Act. Specifically, those invalidated sections require physicians and pharmacists to report to the state the identities of all persons who are prescribed "Schedule II" medications by their physicians. N.Y. Pub. Health Law §§ 3331(6), 3332(2)(a), and 3333(4) (McKinney Supp., Jan. 1976).

"Schedule II" substances include a variety of drugs which are recognized as having legitimate medical uses. For example, "Ritalin" is used to treat hyperkinetic children or children with behavior problems; amphetamines are used to treat narcolepsy and epilepsy. Several of the drugs are frequently used in the practice of psychiatric medicine. Appendix, 148-49. The reporting pro-

visions require that every time Schedule II medication is prescribed, the prescription must be completed in triplicate on an approved state prescription form. A copy of the prescription, which includes the patient's name, must be sent to the New York State Department of Health, which retains it for five years. The pharmacy and the doctor are each required to keep one of the remaining copies for five years.

The copies of the prescriptions filed with the State Department of Health contain the name, age and address of the patient, information identifying the prescribing physician, the dispensing pharmacy, relevant dates, and the name of the drug dispensed and dosage levels. N.Y. Pub. Health Law § 3332.

Upon receipt of the copies of the prescriptions, the Department of Health has all the information coded and keypunched into discs and subsequently transferred to magnetic tapes for use by the computer. Appendix at 91-2. No special coding system is used to protect the names of prescription users, which are programmed directly onto the computer, together with the other information. Appendix at 92.

The computer produces various "printouts," including a printout of all patients who receive a prescription for Schedule II medication in excess of a 30-day supply. Appendix at 96-7. In addition, a printout of the medication history of any person in the computer is made available, upon request, to the Bureau of Narcotic Control. Appendix at 97. The computer printouts are not limited or regulated by the statute, regulations or policy directives of the State Department of Health. Nor are there limits to the uses to which the printouts may be put by the Department of Health. The computer does *not* contain the names of persons identified as "addicts" or "habitual users," N.Y. Pub. Health Law § 3331(1), as other pro-

visions of the Act are specifically applicable to such persons. Approximately 1.5 million prescriptions identifying their recipients are filed each year. Appendix at 92.

The patient-appellees objected to the filing and computerization of their names, claiming that the statute infringed their personal right to autonomously care for, and to seek effective treatment for, their health problems. The doctor-appellees claimed that the statutes interfered with and limited legitimate treatment choices for their patients. This unnecessary intrusion upon the patient-doctor relationship, it was contended, violated appellees' constitutional right to privacy.

After initially issuing a temporary order restraining the state's compliance with the statutes, the district court dismissed the complaint for want of a substantial federal question, *Roe v. Ingraham*, 357 F. Supp. 1217 (S.D.N.Y. 1973). The United States Court of Appeals for the Second Circuit, in an opinion by then Chief Judge Friendly, reversed this decision, 480 F.2d 102 (2d Cir. 1973), holding that "the individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescriptions for them would lie rather close to the continuum [of constitutional privacy]," *id.* at 108. The Court of Appeals also found that plaintiffs-appellees were entitled to a continuation of the restraining order, and that a three-judge court should be convened to consider the constitutional claims.

A three-judge court was then convened. It dissolved the restraining order, denied cross-motions to dismiss, and required the Appellees to put on evidence in support of their claims, 364 F. Supp. 536 (S.D.N.Y. 1973). The parties thereupon entered into discovery, and produced a stipulation of facts, and agreements upon the issues to be tried, and the exhibits and witnesses to be used at such a trial.

Extensive expert and lay testimony and depositions by the Appellees established that, as a result of the filing and computerization of legitimate medicine users' names, patients' fears of improper disclosures deterred them from seeking necessary medical assistance, and encouraged them to discontinue proper use of scheduled medications. Appendix at 89-263. Testimony disclosed, for example, that parents had discontinued their children's use of Schedule II medication out of fear that they would be labeled addicts, Appendix at 123, 170-72. In at least one instance, the discontinuation of medication resulted in the hospitalization of a patient, Appendix at 141-43.

At the conclusion of the hearing, the three-judge court ruled for Appellees. The court acknowledged New York's legitimate interests in regulating addictive drugs, but concluded that the collection of patients' names contributed nothing toward the achievement of that purpose. It therefore held that "so much of the New York Health Law as requires reporting to state authorities in Albany the names and addresses of patients who receive Schedule II drugs as medication prescribed by duly licensed physicians is an unconstitutional interference with plaintiff's rights of privacy guaranteed under the Fourteenth Amendment." *Roe* v. *Ingraham*, 403 F. Supp. 931, 938 (S.D.N.Y. 1975).

The state's motion to this Court for a stay of the final order below was denied, —— U.S. ——, 96 S. Ct. 164 (1975). Probable jurisdiction was noted, —— U.S. ——, 96 S. Ct. 1100 (1976), and this appeal follows.

SUMMARY OF THE ARGUMENT

A narrow question is presented for review in this appeal—whether New York has made a sufficient showing to constitutionally justify its need for obtaining and computerizing the names of every person in the

state for whom certain medications with legitimate medical uses are prescribed. New York's authority to regulate narcotic substances is not at issue. Only the limited portion of the larger regulatory scheme that pertained to the collection of individuals' names was held to be unconstitutional by the court below. The propriety of that holding is the sole question before this Court.

The decision to seek appropriate health care for one's mind or body and to choose for one's self from among appropriate modes of available treatment is the kind of fundamental personal decision which is protected by the due process clause and by the personal right of privacy emanating from the Fourteenth Amendment. The process of entering into an "intimate personal relationship" with one's physician, and of relying on consultation with one's physician to make personal health care choices, is also a constitutionally protected aspect of privacy.

The court below took extensive evidence with regard to the effect of New York's requirement that the names of all patients using Schedule II drugs be filed and centrally computerized. It concluded that the challenged provisions seriously interfered with Appellees' constitutionally protected privacy by deterring and inhibiting them from voluntarily seeking needed medical assistance and by limiting the range of legitimate treatment modes available to them.

On their face the challenged requirements resemble other "neutral" record-keeping provisions, which do not interfere with personal privacy. However, the record in this case shows that the risk of disclosure of Appellees' names, coupled with the destructive social stigma that attaches to persons suffering from conditions for which Schedule II medications are prescribed, has de-

terred and limited Appellees' voluntary access to necessary and legitimate medical treatment.

In order to justify this interference with constitutionally protected privacy the Appellants must demonstrate that the challenged sections are necessary to accomplish a significant state purpose and are no more intrusive than necessary for the accomplishment of that purpose. While recognizing that the state had a significant interest in regulating Schedule II medications, the three-judge district court below found that "[h]aving the name of the person receiving the drug on the state form adds nothing" and that the challenged provisions had a "needlessly broad sweep." 403 F. Supp. at 937. It therefore held the challenged provisions violative of constitutional privacy. This decision is supported by the facts of record, is not clearly erroneous, and accordingly should be affirmed.

ARGUMENT

I. THE RIGHT TO SEEK APPROPRIATE CARE FOR ONE'S OWN BODY AND TO CHOOSE APPROPRIATE MODES OF TREATMENT BASED UPON CONSULTATION WITH ONE'S PHYSICIAN IS INCLUDED WITHIN A ZONE OF CONSTITUTIONALLY PROTECTED PRIVACY.

Appellees argue that the challenged provisions of Article 33 of the New York Public Health Law constitute a serious and unnecessary intrusion upon a zone of constitutionally protected privacy. At the outset this Court must decide whether the constitutional guarantee of personal privacy embraces the right to seek medical care and to choose appropriate modes of treatment for conditions such as hyperactivity, epilepsy, or depression. As the following analysis demonstrates, the privacy rights asserted by these Appellees are virtually identical to rights that this Court has already held to be constitutionally protected in its prior privacy decisions and should, therefore, be afforded similar protection.

One of the chief factors this Court has focused upon in prior decisions in which it has found a constitutionally protected right to privacy has been an individual's right to make decisions concerning important personal matters. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), this Court observed that:

> "If the right of privacy means anything, it is the *right* of the *individual*, married, or single, *to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person* as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis partly in original and partly added).

This Court's concern for autonomy in making health decisions is most clearly articulated in the "abortion" cases. In *Roe* v. *Wade*, 410 U.S. 113, 152 (1973), this Court held that a woman's right to terminate her pregnancy was a "fundamental" constitutional right subject to regulation only on the basis of a compelling state interest. *Doe* v. *Bolton*, 410 U.S. 179 (1973), recognized a pregnant woman's constitutional right to make the abortion decision on the basis of advice from her own physician without the approval of a hospital committee or the concurrence of other doctors.[1] As Justice Blackmun wrote for the majority in *Roe* v. *Wade*, *supra*:

> "[I]n a line of decisions . . . going back perhaps as far as *Union Pacific Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right

[1] "The . . . *right* to receive medical care in accordance with [a] licensed physician's best judgment and the physician's right to administer it are substantially limited [by these requirements]," 410 U.S. at 197 (emphasis added).

> of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of liberty,' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education, . . ." 410 U.S. at 152-53.

The Court went on to hold that the right of privacy was founded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" and was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*

In *Planned Parenthood of Missouri* v. *Danforth*, —— U.S. ——, 44 U.S.L.W. 5197 (July 1, 1976), the Court voided statutory provisions that required wives to obtain spousal consent and minors to obtain parental consent prior to an abortion. The Court wrote that *Doe* and *Roe* "clearly establish that the State may not restrict the decision of the patient and her physician regarding abortions during the first stage of pregnancy," *id.* at 5201, and affirmed that the woman's autonomy in making the personal medical decision to have an abortion is sufficiently important to outweigh even the competing interests of a spouse or parent.

In finding that the right to privacy is broad enough to encompass abortion decisions, the Court stressed the adverse impact caused by denying a woman her ability to make this important personal decision. Among the "specific and direct" physical and psychological harms occasioned by the state's interference were the pressures of maternity and of child care, the emotional distress associated with an unwanted child, and the social stigma

of unwed motherhood. 410 U.S. at 153. Infringement upon one's ability to decide whether to seek or continue treatment with Schedule II medication can also result in "specific and direct" harms, as will be discussed in Section II, *infra*. And, like a woman's decision concerning the continuation of her pregnancy, an individual's decision concerning treatment for physical or emotional conditions is also an aspect of one's constitutionally protected "*freedom to care for* [*his or her*] *health and person.*" *Roe* v. *Wade*, *supra*, at 221 (Douglas, J. concurring) (emphasis in original).

A second factor present in decisions recognizing a constitutional right to privacy has been a "protected intimate relationship." *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 66, n. 13. In *Griswold* v. *Connecticut*, *supra*, for example, the relationship between husband and wife was given constitutional protection because maintaining the privacy of this intimate personal relationship was central to the meaningful exercise of other constitutionally protected rights. While several of this Court's privacy decisions have concerned family relationships, they have strongly suggested a need to recognize that certain aspects of an individual's non-familial relationships, particularly those with his or her doctor, are also constitutionally protected, *see, e.g.*, *Eisenstadt* v. *Baird*, *supra*, at 453.

For example, in the "abortion" decisions the Court stressed the importance of allowing the woman opportunities to consult with her physician so that her right to make her decision could be meaningful and informed. In *Doe* v. *Bolton*, *supra*, this Court struck down a statute which required the woman's abortion decision to be approved by two physicians and a hospital abortion committee in addition to the recommendation of the pregnant woman's own consultant. The Court concluded that the woman's "right to receive medical care in accordance with her licensed physician's best judgment" was "sub-

stantially limited by that statutory provision," which was "unduly restrictive of the patient's rights." 410 U.S. at 197-98.[2] In his concurrence to *Roe* v. *Wade*, Justice Douglas placed special emphasis on the privacy of the relationship between patient and doctor:

> ". . . the right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship. . . . The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values." 410 U.S. at 219-20.

"Protected intimate relationships" were again emphasized in *Paris Adult Theater I* v. *Slaton*, *supra*, and *United States* v. *Twelve 200-Foot Reels of Super 8 MM Film*, 413 U.S. 123 (1973). In *Paris*, Chief Justice Burger, writing for the majority, noted that the privacy right recognized by earlier Court decisions "encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing." 413 U.S. at 65. In upholding a Georgia regulation of allegedly obscene materials exhibited at an "adult theater," Chief Justice Burger distinguished *Stanley* v. *Georgia*, 394 U.S. 557 (1969), which had recognized a limited right of privacy to possess obscene materials in the home, from other cases recognizing broader privacy rights "arising from a special relationship." 413 U.S. at 66-7. As the Court held in *Paris*,

> "The protection afforded by *Stanley* v. *Georgia* is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation and child-rearing is not

[2] "Indeed," wrote then Chief Judge Friendly in a prior decision in this case, "there is language in *Doe* v. *Bolton* from which it could be argued that the Court has already taken the step of extending constitutional protection to the privacy of the doctor-patient relationship." 480 F.2d 102, 108, n. 8.

> just concerned with a particular place, but with a *protected intimate relationship.* Such protected privacy extends to *the doctor's office*, a hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." 413 U.S. at 66, n. 13 (citations omitted and emphasis added).

In *United States* v. *Twelve 200-Foot Reels of Super 8 MM Film*, *supra*, Chief Justice Burger reanalyzed the list of protected intimacies as "a *sphere* of constitutionally protected privacy, such as that which encompasses the *intimate medical problems* of family, marriage and motherhood." 413 U.S. 126, n. 4 (emphasis added).

Significantly, the medication decisions which plaintiffs seek to have constitutionally protected in this case also fall within other zones of activity where this Court has specifically recognized constitutional limitations upon the state's power to substantively regulate conduct. As noted in *Paul* v. *Davis*, —— U.S. ——, 96 S. Ct. 1155, 1166 (1976), "the activities detailed as being within [constitutionally protected privacy are] . . . matters relating to . . . family relationships, and child rearing and education." In this case, the record below establishes that parents of a four-year-old hyperkinetic child receiving Ritalin were forced to consider taking him off the medication, even though their physician believed it to be in the child's best interest. Appendix at 115-18. A medical decision to give an amphetamine to a hyperactive child falls squarely within the zone of constitutional privacy relating to family relationships, child rearing, and education.[3]

[3] An additional aspect of privacy—one's right to selectively disclose personal information without undue governmental interference—is also raised by the facts of this case. Both the three-judge district court and the Second Circuit, in different stages of the proceedings below, focused upon this "disclosure" aspect of privacy. As the district court noted, "an individual's physical ills and disabilities, the medication he takes, the frequency of his medical

Each of the basic factors outlined by this Court in earlier cases defining constitutionally protected privacy —a fundamental personal decision, an intimate relationship, family and child-rearing matters—are present in this case. Accordingly, this Court should hold that an individual's right to seek and continue appropriate medical treatment based upon consultation with one's physician is constitutionally protected.

II. NEW YORK'S REQUIREMENT THAT CERTAIN PRESCRIPTIONS BE REPORTED AND COMPUTERIZED SERIOUSLY INTERFERES WITH APPELLEES' CONSTITUTIONAL RIGHT TO PRIVACY IN SEEKING APPROPRIATE CARE FOR THEIR OWN MINDS AND BODIES AND IN CHOOSING TREATMENT AFTER CONSULTATION WITH THEIR PHYSICIANS.

Appellants contend that the challenged statutory requirement is simply a record-keeping procedure which does not directly prohibit or limit any activity by Appellees. On this basis, Appellants would distinguish the instant case from the "abortion" decisions and other cases in which this Court has voided statutes that directly infringed constitutionally protected privacy. Upon inspection, however, this "distinction" fails because the challenged New York provisions result in the same kind of deterrence and interference with protected privacy (although here in the context of medication decisions)

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consultation are among the most sensitive of personal and psychological sensibilities. One does not normally expect to be required to have to reveal to a government source, at least in our society, these facets of one's life. Indeed, generally one is wont to feel that this is nobody's business but his doctor's and his pharmacist's." 403 F. Supp. at 937. Chief Judge Friendly, writing for a unanimous Second Circuit panel, stressed "the individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescriptions for them." 480 F.2d at 108.

that was presented by direct statutory prohibitions in the abortion cases.[4]

Obviously, the Appellants did not intend to collect this information for the express purpose of deterring its citizens from seeking medical advice. But the Constitution provides protection "even if any deterrent effect on the exercise of [constitutional rights] arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . ." *Buckley* v. *Valeo*, —— U.S. ——, 96 S. Ct. 612, 656 (1976).

The New York statute is strikingly similar to the Missouri statute preventing the use of Medicaid funds for abortions not medically required that was challenged in *Singleton* v. *Wulff*, —— U.S. ——, 44 U.S.L.W. 5213 (July 1, 1976). Missouri did not directly prohibit abortions; it permitted the operation but refused to spend public funds to pay for a needy woman's abortion. In holding that physicians had standing to challenge the statute, a plurality of the Court, looking to the *consequences* of that regulation, noted that "an impecunious woman cannot easily secure abortion," and therefore the "woman's exercise of her right . . . is . . . necessarily at stake here." 44 U.S.L.W. at 5216.

As will be demonstrated below, it is the stigmatizing consequences of disclosure of the use of certain Schedule

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[4] Appellants effort to characterize this as a "narcotics control case" is likewise without merit. Schedule II includes many substances which are recognized as having legitimate medical uses, and the patients herein are all persons for whom these medications have properly been prescribed. The medications are frequently used by physicians and psychiatrists to ameliorate the chronic pain and disabling effects of schizo-affective disorders, epilepsy, narcolepsy, and childhood hyperkinesia, among other problems. Appendix at 148-49, 204-05. Moreover, "addicts" and "habitual users" are specifically *not* included in these recordkeeping provisions. N.Y. Pub. Health Law § 3331(1).

II drugs that distinguishes the regulations under attack from truly neutral regulations such as those governing the filing of birth and death certificates or registration with the Social Security Administration. *Cf.* Brief of Appellants at 18. The record below establishes that some patients were deterred from seeking medical advice, and that others discontinued treatment or selected less useful treatment alternatives rather than continue to use Schedule II medications which would require reports to the State Department of Health.[5] They realistically feared that reporting and computerizing the names of legitimate Schedule II medication users might result in the disclosure of this private information, and therefore subject them to being improperly and unfairly stigmatized as criminals, drug addicts, narcotics abusers, and/or persons with embarrassing medical or psychological problems. The three-judge court properly concluded that "[t]here is no question but that the statutory requirement challenged here intrudes upon and interferes with the doctor-patient relationship," 403 F. Supp. at 937.

Damaging stigma may attach both to users of some of the Schedule II drugs themselves, and to persons having the underlying physical and psychological conditions for which some of these drugs are prescribed. Persons labeled "mentally ill" often face social stigma equivalent

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[5] The operation of the challenged New York provisions is described fully in the Statement of the Case, pages 5 to 7, *supra*. In brief, whenever a Schedule II medication is prescribed, the physician must complete a triplicate prescription form. This form contains the name, age, and address of the patient, the name and amount of the medication dispensed and the level of dosage. One of these forms is forwarded to the State Department of Health, which retains it for five years. The information on the form is coded and transferred to magnetic tapes for use by a computer. The computer produces monthly "printouts," including one that lists by name all patients who have received a prescription for a Schedule II medication in excess of a 30-day supply.

to, or greater than, that recognized by this Court as affecting unwed mothers in *Roe* and *Doe*, *supra*, 410 U.S. at 153. "Some diagnostic terms have discriminatory social connotations and cause injury . . . if made known to others." American Psychiatric Association, *Confidentiality and Third Parties* iv (Task Force Report No. 9, 1975). As a recent Harvard Law Review Developments Note explains:

> ". . . a former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities. Many people have an 'irrational fear of the mentally ill.' The former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracised and victimized by employment and educational discrimination. Finally, the individual's hospitalization and post-hospitalization experience may cause him to lose self-confidence and self-esteem." Note, "Developments in the Law, Civil Commitment of the Mentally Ill," 87 *Harv. L. Rev.* 1190, 1200 (1974) (footnotes omitted).

The APA Task Force Report, *supra*, catalogues reports from psychiatrists of injuries caused their clients by the stigmatizing disclosure of psychiatric treatment. These incidents include, *inter alia*, the loss of employment, divorces, loss of insurance coverage and benefits, and the avoidance of necessary treatment out of fear of disclosure. Task Force Report, *supra*, at 53-59.

Revelation of the names of medicine users and centralization of data in a computer enhances the risks that information will be improperly circulated and used out of context. As the record in this case shows, if centralized reporting increases the risk of disclosure with consequent stigma, the risk that persons needing psychotherapeutic treatment will be deterred from seeking that treatment correspondingly increases.

James Moe testified that he had taken his child off of a Schedule II medication because he feared that the state would develop a "long file in a narcotics and dangerous drug context," Appendix at 123. Martha Patient testified that, out of fear of the computer, she discontinued use of her properly prescribed medication for migraine headaches until severe pain forced her to renew her prescription. Appendix at 141-43. Jane Poe believed she would be labeled a "dope addict." Appendix at 138-39. George Patient, suffering from cancer, tried to substitute medication not on Schedule II, and finally resorted to the subterfuge of purchasing the Schedule II medication in a neighboring state that did not require central registration. Appendix at 87-88. Mary Doe, the mother of a nine-year-old hyperkinetic child, testified that she had taken her [illegible] off of his prescribed Schedule II medication because she feared he would be "branded for life" as a drug abuser. Appendix at 170-72.

The questionable security of New York's computer system heightens the potential for the improper use or disclosure of the computerized information. No special coding system is used to protect patients' names. A printout of the entire medication history of any name in the computer is routinely made available, upon request, to the Bureau of Narcotic Control. There is no statutory regulation of the use of the information, nor has the Department of Health promulgated policies regarding the storage, use, or dissemination of this information. Unrebutted evidence of record established that there was a substantial risk of improper disclosures of the prescription data gathered by New York State because (1) *physical* security, *i.e.*, guards, locks, alarms, was inadequate; (2) *procedural* security, *i.e.*, employee clearance regulations, in-service training, was inadequate; and (3) *data* security,

i.e., protection, presentation, and duplication of magnetic and printed information, was deficient. Appendix at 302-35.[6]

Given the serious stigma associated with disclosures of the use of certain Schedule II medications, and the questionable computer security system, it is not unreasonable for Appellees to be deterred from seeking medical care, even where it would be otherwise indicated. Several doctors testified that patients, when advised of the centralized reporting requirements, expressed "shock, fear, and concern," 403 F. Supp. at 935. They testified further that as a result of the reporting requirements, their professional relationships with these patients had been adversely affected, and that individuals who might need medication would be "dissuaded" from "undergoing treatment." *Id.* at 934.

The quality of the psychotherapeutic relationship is substantially undermined when the patient learns of the existing potential for governmental intrusion. "[S]ecurity from abuse of privacy forms a condition without which it would be difficult to practice psychiatry and psychotherapy at all." American Psychiatric Association, *Confidentiality and Third Parties, supra,* at iv.[7] The "very essence" of psychotherapy "is confidential personal reve-

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[6] Because the court below found the state's "need" to collect the names of prescription users in order to accomplish its legitimate drug regulation functions to be minimal (*see,* discussion at Section III, *infra*), it found it unnecessary to rule upon the adequacy of the operative state procedures to insure confidentiality, 403 F. Supp. at 938.

[7] ". . . there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment," Group for the Advancement of Psychiatry, *Confidentiality and Privileged Communications in the Practice of Psychiatry* 82 (Report No. 45, 1960); ". . . the psychiatrist must instill complete confidence . . . that he will not reveal such secrets to others," N. Spingarn, *Confidentiality: A Report of the 1974 Conference on Confidentialty of Health Records* 2 (1975).

lations about matters which the patient is (and should be) normally relutcant to reveal or discuss." R. Slovenko, *Psychotherapy, Confidentiality and Privileged Communication* 40 (1966). For these reasons, "[t]he threat to confidentiality is of even greater concern to psychiatry than to the rest of medicine." N. Spingarn, *Confidentiality: A Report of the 1974 Conference on Confidentiality of Health Records, supra,* at 2.

Not only do the challenged provisions deter persons from seeking out or continuing necessary psychotherapeutic treatment, but they also severely limit available treatment options. Depending upon a person's needs and condition, and the practitioner's skills and training, a person and his or her psychiatrist may choose to undergo some form of psychotherapy, a "somatic" therapy, or to be voluntarily hospitalized. Perhaps the most common option, however, and one often used in conjunction with another treatment modality, is the prescription of a psychotherapeutic medication, "a major weapon in the armamentarium of the physician." Parry, Balter, Mellinger, Cisin, Manheimer, "National Patterns of Psychotherapeutic Drug Use," 28 *Arch. of Gen. Psychiatry* 769 (1970). *See also* 1 L. Wolberg, *The Technique of Psychotherapy* 91 (2d ed. 1967). A practitioner knowing that he or she must report every patient's name to a central computer bank may be hesitant to suggest the use of the scheduled medication. A patient advised of the reporting requirement may likewise be inhibited from using such medications, regardless of the clinical indications favoring its use. The result is the harmful reduction of the patient's legitimate treatment options. Indeed, the record in this case shows that Mary Doe took her nine-year-old son off of prescribed medication despite her physician's advice, Appendix at 171. Martha Patient's discontinuation of her Schedule II medication resulted in her hospitalization. Appendix at 142.

In sum, there can be no doubt that the challenged New York record-keeping system has interfered with Appellees' legitimate exercise of protected constitutional rights.

III. NEW YORK HAS FAILED TO MEET THE CONSTITUTIONAL STANDARD FOR JUSTIFYING ITS INFRINGEMENT UPON APPELLEES' CONSTITUTIONAL RIGHT TO PRIVACY.

A conclusion that a state regulation may be infringing upon constitutional rights does not, of course, end a court's inquiry into the permissibility of that infringement. The right to privacy, like other constitutional guarantees, "is not unqualified and must be considered against important state interests in regulation." *Roe* v. *Wade, supra,* 410 U.S. at 154. When these interests "become sufficiently compelling," *id.*, limited governmental incursions upon the right may be justified.[8]

Without question, the regulation of medication is a proper and legitimate governmental activity. It is not enough, however, that a state have some legitimate *general* purpose:

> "In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision." *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972).

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[8] This principle is reflected in the limitations upon a person's expectation of privacy in his or her confidential relations with a physician. Physicians and psychotherapists have a duty to report epidemics, communicable diseases, and other conditions where they believe a substantial risk of imminent physical injury to the patient or to others exists. *See, e.g.,* Allen, Ferster, and Rubin, *Readings in Law and Psychiatry* 239-250 (1975). These exceptions to the rule of confidentiality are justified either by the lack of privacy expectation in the communication, as when it relates to criminal activity, or by the existence of exigent circumstances that pose an imminent danger to the community.

See also, Shapiro v. *Thompson*, 394 U.S. 618 (1968); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Shelton* v. *Tucker*, 364 U.S. 497 (1960). Thus, as District Judge Carter noted at an earlier stage of these proceedings:

> "The critical question is whether the objective which the regulation seeks to accomplish is necessitated by a subordinating state interest jusifying the *degree* and *consequences* of the result in personal intrusion." 364 F. Supp. 536, 546 (emphasis added).

In *Doe* v. *Bolton*, *supra*, the state conditioned its sanctioning of a woman's decision to abort her fetus on the prior approval of two physicians, as well as a hospital committee, and limited the place in which the operation could be performed to certain licensed hospitals, 410 U.S. at 184. This Court struck down those statutory conditions because there is "no constitutionally justifiable pertinence" in conditions which unduly limit "a woman's right to receive medical care in accordance with her licensed physician's best judgment." 410 U.S. at 197.[9] A review of this record shows a similar lack of "constitutionally justifiable pertinence" in the challenged requirements in the instant case.

Prior to its final decision the three judge district court declined to issue preliminary relief because the evidence produced at that time was insufficient to establish that "the consequences of the resulting intrusions are not justified when considered against the state's interest." 364 F. Supp. at 546. Instead, the court called for an evidentiary hearing on the merits to offer plaintiffs the opportunity to demonstrate "that the computerization of names

[9] Specifically, the Court found that the licensure requirements did "not relate to particular medical problems and dangers of the abortion operation," 410 U.S. at 194; that the approval "by a committee once removed from diagnosis is basically redundant," *id.* at 197; and that the two-doctor certification for abortions was the only instance of the legislature requiring "confirmation by two other physicians" for voluntary medical treatment, *id.* at 199.

is not necessary for the accomplishment of the state's goals, that the controls developed by the state are inadequate to protect against unauthorized disclosure of the computerized information and that the injury to the plaintiffs resulting from the implementation of this system as centralized filing is sufficiently serious to overcome any competing state interest." *Id.* at 546-47.

Only after Appellees had the opportunity to present evidence on these issues was the three-judge district court finally persuaded that the state regulatory scheme —although it did foster a legitimate state purpose—had a "needlessly broad sweep." 403 F. Supp. at 937.

The purpose of New York's enforcement scheme is to regulate the physician and the pharmacist who store, control, and dispense Schedule II medication. The evils the statute aims to curb are (a) professional abuses, such as overprescription and overdispensing of drugs, and (b) illegal diversion of drugs, such as thefts from pharmacies, stolen prescription blanks, or forged signatures. Appendix at 94. It certainly is proper, therefore, for the state to require physicians and pharmacists to keep records and to file reports. But when, as here, the state also demands that the name, age, address, type, and amount of drug prescribed for every medication user be automatically filed in a state-wide computer, it has gone far beyond its legitimate need to prevent professional abuse and illegal diversion.

The state *stipulated* in the district court that the only reason it required the names of patients was to identify persons who, using the same name, went from doctor to doctor to obtain an illegal cache of medication. Appendix at 95. The court below found that the sole purpose for collecting the names of patients was "to identify individual patients who without using an alias went from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in any

single month." 403 F. Supp. at 937. Appellants have not provided this Court with any additional reasons justifying the collection of every patient's name (Brief for Appellants at 26-30) and indeed no other reason exists. The court below found as a matter of fact that the state's "need" for the names was illusory, evidenced by the fact that only one person suspected to have secured multiple prescriptions in a particular month had been discovered during the program's four-year existence, 403 F. Supp. at 934.[10] As a matter of common sense, it is unlikely that a person seeking to hoard drugs for personal consumption or sale would use his or her real name and address, or use the same name each time he or she visited a different doctor. As the three-judge district court held, the speculative returns of the challenged statutes were "too great a price to pay for such a small yield." *Id.*

Significantly, most regulatory schemes in other jurisdictions do not require the filing of patient names on prescriptions. The Uniform Controlled Substance Act (1970), which is similar to the narcotic control statutes in forty states, specifically provides that a medical practitioner or researcher "is not required or compelled to furnish the name or identity of a patient or research subject. . . ." Section 504(c). Although the act requires that prescription records be kept, they are to be maintained by individual practitioners, and can be obtained by the state only through a warrant, unless there is consent, or an emergency, § 502(b)(4). Thirty-six of the forty states that have modeled their statutes on the Uniform Act do not require the reporting of patients'

[10] Appellants have now made vague references to an additional 45 "referrals" uncovered in September 1975, Brief of Appellants at 27, note * * *. Since these unverified figures are not part of the record, they should not be considered by this Court. At the very most, any consideration of this alleged new information would justify a remand to the district court, and not a reversal of its decision.

names to a centralized data bank.[11] Nor does the Federal Drug Abuse Act, 21 U.S.C. § 801, *et seq.* (1972), require the centralized filing of prescriptions or the revelation of patients' names.

The Appellants argued below that computerizing records with patient names was really no different from the prior regulatory requirement that prescriptions with patient names had to be kept by pharmacists and made available for state inspection. The three-judge district court rejected this argument, observing that "the intrusion here is not only more immediate, its impact is greater." 403 F. Supp. at 938. As that court aptly noted, "a name on a prescription in the files of one of many thousand pharmacists in the state of New York is entirely different from one's name on a form in Albany which is transferred to computerized records and stored for instant retrieval." *Id.* The potential for inappropriate disclosure or actual misuse that exists whenever information is gathered is greatly magnified by the creation of a central depository of medical information. A central data bank poses substantial risks of human error, mechanical malfunction, or corruption. As the 1974 Conference on Confidentiality of Health Records concluded, "the administrative conveniences provided by the high degree of computerized information centralization gives those who control the recording and preservation of personal data an unprecedented power over us, and are subject to abuse." Spingarn, *Confidentiality: A Report of the 1974 Conference on Confiedentiality of Health Records, supra,* at 4.

The challenged New York provisions differ markedly from other record-keeping and reporting requirements recently approved by this Court. In *Planned Parenthood*

[11] The statutes are set forth in Appendix A to the Memorandum of Appellees Roe, *et al,* in Opposition to the Motion for a Stay and need not be repeated here.

of Missouri v. *Danforth*, *supra*, the state required health facilities and doctors to keep certain records relating to abortions. Significantly, these records were retained by the facility or physician; they were *not* centrally filed and computerized; and the statute did *not* require that each patient be identified by name. Because these records were used solely for statistical purposes to develop health care information, they had "no legally significant impact or consequence . . . on the physician-patient relationship." 44 U.S.L.W. at 5205. The Court noted, however, that even this system "perhaps approach[ed] permissible limits," *id.*

New York's law is by no means so narrow and limited. By contrast with the record-keeping system in *Planned Parenthood*, *supra*, New York's provisions require the central computerization of all records, require that every patient be identified by name, and thus do have a "legally significant impact . . . on the physician-patient relationship." Moreover, it would be improper for the Court to "assume" here, as it did in *Planned Parenthood*, that "the records will not be utilized in such a way as to accomplish . . . unconstitutional restriction[s]," *id.*, because there is overwhelming evidence to the contrary in this record.

Buckley v. *Valeo*, *supra*, involved a challenge to various provisions of a campaign financing law that, *inter alia*, required public disclosure of all individual contributions to presidential candidates. The Court noted that although such disclosures clearly "burdened" or "deterred" the exercise of constitutional rights, 96 S. Ct. at 658, the challenged provision was justified by compelling interests of the highest order—the prevention of election corruption and the opening of the election process to public view. In upholding the disclosure provision, the Court specifically found (indeed, it had been conceded) that disclosure requirements "appear to be the *least restrictive* means of curbing the evils . . ." *id.* (emphasis added).

By contrast, New York has hardly selected the "least drastic means" available for controlling drugs by requiring the massive disclosure and computerization of the name of every legitimate user of certain medications. In fact, the "need" for the collection and retention of the name of every prescription user in the state is illusory. According to the district court, "[h]aving the name of the person receiving the drugs on the State's form adds nothing." 403 F. Supp. at 937. Thus, the New York law is fraught with all the dangers of the federal campaign law, but is saved by none of that law's redeeming justifications.[12]

In sum, although New York has a legitimate state interest in regulating the distribution of Schedule II medication, the provisions challenged herein intrude upon, burden, and deter the exercise of its citizens' constitutionally protected privacy rights. Appellants must bear the heavy burden of demonstrating that its actions are the least intrusive means consistent with achieving its legitimate regulatory purpose. After extensive discovery and briefing, and based on a substantial record, the three-judge court found the challenged provisions to have a "needlessly broad sweep." 403 F. Supp. at 937. This conclusion is consistent with this Court's previous decisions, it is supported by the evidence adduced below, and it should be affirmed.

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[12] Similarly, in United States v. Miller, —— U.S. ——, 96 S. Ct. 1619 (1976), the Court upheld the record-keeping requirements of the Bank Secrecy Act. But those records are not centrally compiled. There is no automatic blanket filing requirement; when information is desired it is obtained pursuant to a subpoena seeking limited, or reasonably particularized, information. 96 S. Ct. at 1624. No such efforts to accommodate privacy rights appear in the instant statutory scheme.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to AFFIRM the decision of the court below.

Respectfully submitted,

ROBERT PLOTKIN
PAUL R. FRIEDMAN
MENTAL HEALTH LAW PROJECT
1220 Nineteenth Street, N.W.
Washington, D.C. 20036
202—467-5730

Counsel for *Amici Curiae*